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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 762

ROY E. CRUMMER, HEWEN A. LASSETER, COURTNEY S. TURNER, WILLIAM J. MEREDITH, JAMES G. MARTIN, VERNON T. McCOMBS, MARJORIE SCHOCKLEY, HERBERT MOON, ROY F. PRESTON, CARL A. MORAWITZ, R. E. CRUMMER & COMPANY, A CORPORATION, AND THE CRUMMER COMPANY, A CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

R. B. CALDWELL,
FRANCIS X. BUSCH,
E. R. SLOAN,
THOMAS M. LILLARD,
Attorneys for petitioners, R. E. Crummer & Company, Roy E. Crummer, William J. Meredith, Courtney S. Turner and Hewen A. Lasseter.

W. F. LILLESTON,
HARRY C. CASTOR,
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Attorneys for petitioners, James G. Martin, Vernon T. McCombs, Carl A. Morawitz, Roy F. Preston, Herbert Moon and The Crummer Company.

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Of Counsel.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Roy E. Crummer, Hewen A. Lasseter, Courtney S. Turner, William J. Meredith, James G. Martin, Vernon T. McCombs, Marjorie Schockley, Herbert Moon, Roy F. Preston, Carl A. Morawitz, R. E. Crummer & Company, a corporation, and The Crummer Company, a corporation, by the undersigned, their respective counsel, pray that this Court issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above-entitled cause on

November 2, 1945 (R. 171), reversing a judgment of the United States District Court for the District of Kansas, Second Division, which had sustained demurrers to the indictment in the above-entitled cause.

OPINION BELOW.

The District Court did not file a written opinion. The grounds on which the District Court sustained the demurrers were stated orally and appear at R. 154 to 158.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 161-171) has not been officially reported.

JURISDICTION.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended. 28 U.S.C.A. § 347 (a).

Jurisdiction of the Circuit Court of Appeals to review a judgment of the District Court sustaining the demurrers to the indictment was invoked by the United States under the provisions of 18 U.S.C.A. § 682.

The judgment of the Circuit Court of Appeals was entered on November 2, 1945. (R. 171.)

Petitioners' application for a rehearing was denied on December 11, 1945, Phillips, J., dissenting. (R. 184.)

QUESTIONS PRESENTED BY ALL PETITIONERS.

The questions presented are: (1) whether it is consistent with the Sixth Amendment to overrule demurrers to an indictment on the theory, that, where there are two constituent elements of a federal offense, the accused has less right to be properly informed by the indictment in respect of one constituent element of the offense than is his

admitted constitutional right with respect to the other element; (2) whether it was proper to overrule demurrers to the indictment in this case on the theory that its substantial defects could be remedied by a bill of particulars; and (3) whether an indictment which is vague, indefinite and inconsistent, and amounts virtually to the charge of an offense in the words of the Statute, satisfies the requirements of the Sixth Amendment; (4) whether the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

QUESTION SEPARATELY PRESENTED BY THE CRUMMER COMPANY.

Whether it was proper for the Circuit Court of Appeals to hold The Crummer Company to trial on *two* counts of the indictment (8-9) when, on the appeal to that Court, the Government had challenged the District Court's determination as to only *one* count of the indictment, namely, Count 9.

AMENDMENT VI.

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *"

STATUTE INVOLVED.

The pertinent provisions of the Mail Fraud Statute (18 U.S.C.A. § 338) are as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed,

any letter, postal card, * * * writing, circular, pamphlet, or advertisement, * * * in any post office, * * * or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any such letter, postal card, * * * writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

STATEMENT OF MATTER INVOLVED.

Ten individuals and two corporations were made defendants to an indictment (R. 1-52), consisting of twelve counts and purported to be laid under the Mail Fraud Statute. (18 U.S.C.A. § 338.)

Each of the defendants filed demurrers (R. 52-64) which in substance challenged the sufficiency of the indictment on the following grounds: (1) that it was so vague, indefinite, uncertain and inconsistent as not to constitute a statement of a criminal charge; (2) that it failed to properly advise the defendants of the cause or nature of the charges or accusations as required by the Sixth Amendment to the Constitution of the United States; (3) that it was duplicitous; and (4) that there was a misjoinder of offenses. (R. 52, 56, 59, 61, 62.)

The District Court heard argument of respective counsel in support of the demurrers and indictment. (R. 72-157.) After taking the matter under advisement the Court sustained the demurrers of the individual defendants: "upon the ground that the indictment is so vague and indefinite and inconsistent that it fails adequately to apprise the defendants of the nature and cause of the accusation." (R. 158.)

In the case of the corporate defendant, The Crummer

Company, the District Court sustained the demurrer of The Crummer Company to all except one count of the indictment upon an additional ground, namely, that the letters alleged by the indictment to have been placed in the United States mails were mailed prior to the time at which it was alleged The Crummer Company became a party to the alleged scheme. (R. 158.)

The District Court having sustained the demurrers to the indictment on grounds that it was defective as a pleading—and there being no construction of a Statute involved in the ruling—the United States petitioned for and obtained leave to appeal to the Tenth Circuit Court of Appeals under the Act of May 9, 1942, c. 295, sec. 1. (56 Stat. 271; 18 U.S.C.A. § 682.)

In the case of all of the individual defendants, the Tenth Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause with directions to enter an order overruling their individual demurrers. (R. 172.)

In the case of The Crummer Company, the Circuit Court of Appeals affirmed the judgment of the District Court in respect of ten of the twelve counts, but entered a judgment of reversal on the *two* remaining counts, namely Counts 8 and 9. (R. 172.) The Crummer Company contends on this petition that, since the United States stated in its briefs filed on the appeal (R. 192) that the Government did not challenge the determination of the District Court, (which limited The Crummer Company's liability to the charge made in Count 9) that the judgment of the Circuit Court of Appeals reversing the District Court on two counts is obviously erroneous.

Petitioners' application for a rehearing was denied December 11, 1945, Phillips, J., dissenting without written opinion. (R. 172, 184.)

The Circuit Court of Appeals granted a stay of mandate to permit submission of this petition. (R. 184.)

The matter to which this indictment relates grows out of the financial difficulties encountered during the economic collapse of the 1930's by the city of Panama City, located in Bay County, Florida. (R. 30.) The obdurate and conflicting claims of creditors and municipality were finally solved in the summer of 1942 when R. E. Crummer & Company, one of the corporate defendants, brought about a refunding arrangement of the city's indebtedness (not criticized in the indictment), which restored the bondholders to a current status and provided for a permanent 4% interest rate. This result is now assailed in an indictment as having been the product of a scheme and artifice to defraud. Petitioners contend that the indictment does not state, with that particularity required by the Constitution, either the facts or the theory of law, which operate to convert, that which was a legitimate commercial transaction into a so-called scheme or artifice to defraud.

The indictment charges the defendants with having devised a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and by omissions to state material facts. (R. 2.) The persons alleged to have been defrauded were twenty-four holders of municipal bonds issued by the City of Panama City, Florida. (R. 2.) Nowhere in the indictment is there any description of the Panama City bonds or coupons which it is claimed were the object of the scheme, nor is there any description of the Panama City bonds or coupons alleged to be owned by any of the persons to be defrauded, nor what bonds or what interest the defendants or any of them sought to obtain. An acquittal on this indictment will afford these petitioners absolutely no protection against a second similar

prosecution which describes a specific series of bonds, and relies upon different indictment letters, because it cannot be told from this indictment what Panama City bonds or what Panama City coupons were the object of the so-called scheme.

It is alleged that the scheme or artifice commenced on about January 1, 1931, and extended up to the date of the return of the indictment on August 3, 1944. (R. 2, 52.) The criticised activities of the defendants, therefore, cover a period of more than thirteen years.

It is charged that as part of the scheme, the defendants "dominated and controlled" the business of three corporations, respectively, The Brown-Crummer Investment Company, organized in 1919; R. E. Crummer & Company, organized in 1934; and The Crummer Company, organized in November 1942. (R. 2, 3, 4.) The petitioners are *not* informed by the indictment of *any* facts, evidentiary or ultimate, from which is drawn the conclusion that the defendants "dominated and controlled" the said corporations.

The indictment charges (R. 3) that it was part of the alleged scheme for defendants to organize, in May 1931, under a written instrument entitled "Bondholders Committee Agreement" a Bondholders Protective Committee which would be under the "domination and control" of the defendants; that holders of such securities as had been designated by the Committee as eligible for deposit with it, might become parties to the Agreement by depositing their bonds with The Brown-Crummer Company. (R. 3.) The indictment does not assert that Panama City bonds were ever designated by the Committee as eligible for deposit with it. It is not alleged that either the names of persons constituting the Committee or the terms of the Agreement were unknown to the Grand Jurors. The in-

dictment does not state whether it is claimed that this Committee was composed of the defendants or of other persons. The substance of the Agreement is not stated. The indictment does not claim that the defendants ever misrepresented the Agreement—it is said that they withheld from the persons defrauded, information as to its terms. The indictment contains no allegation as to the substance of the information withheld or when or under what circumstances in the alleged thirteen-year span of the scheme the nondisclosure occurred. A statement of the substance of the information claimed to have been withheld, the time, and the circumstances then prevailing are imperative, both in order that the defendants can prepare their defense thereto and in order that it might be seen, whether, under the circumstances, there then existed any duty to speak. What part this Committee played or was to play in the so-called scheme is nowhere stated. This indictment is so indefinite in its allegations concerning the Bondholders Protective Committee that the District Court said at the hearings: "• • • I am unable to determine from the indictment just what part the Bondholders Committee played in this transaction • • •." (R. 124.)

The indictment charges (R. 4) that the defendants would and did "compose, phrase and arrange" written powers of attorney and temporary representation agreements which they "fraudulently" induced the holders of Panama City bonds to sign and deliver to the defendants together with their past due Panama City bonds and appurtenant coupons. It appears from the indictment that there were different powers of attorney and temporary representation agreements, so-called. (R. 17, 18.) No facts, either evidentiary or ultimate, are stated to support the conclusion that such agreements were "fraudulently obtained" from bondholders.

It is then charged (R. 5) that it was part of the scheme for the defendants to "involve" the (undescribed) Panama City bonds and interest coupons of the persons alleged to have been defrauded, in two separate suits brought against the City of Panama City in the United States Court for the Northern District of Florida. No times being stated, it is said judgments were obtained thereupon and money and new refunding bonds collected; that the defendants failed to disclose to the persons defrauded information concerning the collection of money and new refunding bonds, failed to make an accounting, and would and did convert a "large part" to their own use. (R. 5.) Here the indictment is particularly equivocal, vague and uncertain. At one point the text of the indictment is so couched that it would appear that the last mentioned allegations concerned both suits. (R. 5.) At another point (R. 9) it would seem that only one suit is meant. There is no description of bonds or indication of the ownership of the bonds involved in either of the judgments; or the amount of such bonds. There is no claim that the petitioners did not own or have any interest in such bonds and coupons. There is no allegation of the amount of money claimed to have been converted. This is referred to merely by the vague phrase: "a large part." There is no identification of the new bonds which it is alleged were received on the judgment, nor to whom the bonds belonged. There is no allegation as to the time when the suits were brought. Nor when any monies were collected or when the alleged conversion took place. All charges are couched in the vaguest and most general of terms.

The District Court was particularly troubled and puzzled by these portions of the indictment.* (R. 116, 121, 124.)

* "The Court: (To the District Attorney.) Now, I tell you one reaction I have had in making a study of this indictment. The defendants contend that they are unable to determine the nature of the charges made against them. In studying this indictment, and I find that I have had consider-

The District Court pointed out that there was nothing in the language of the indictment to indicate that a refunding agreement which was made with the City in May, 1942, had anything to do with the bonds involved in the suits. (R. 123.) The entire situation is still further confused by a construction placed upon this indictment by the United States in the brief filed in the Circuit Court of Appeals. (R. 217.) There respondent said (notwithstanding allegations to the effect that bonds and their coupons were obtained at the same time) that the scheme was related, *not* to the principal but to the interest on the bonds. Thus it would appear that the theory of the United States is that the so-called scheme (alleged to have been one to defraud persons desirous of recovering their money invested in Panama City bonds (R. 2)) was both valid and invalid at one and the same time. Proper in respect of principal; improper in respect of interest.

With respect to the indictment's statement of the false representations and pretenses alleged to have been employed, the indictment charges the defendants with having represented (no time being stated) that the city of Panama City was making funds available to liquidate, at the respective rates of 2 % and 3%, prior to and during the years 1937-1940, the defaulted 5%, 6% and 7% interest coupons which had matured during those years, when, as a matter of fact, the defendants had provided the funds to liquidate the coupons. (R. 8.)

The indictment makes no charge that the 2% and 3% price paid to the bondholders was inadequate or improvident in the light of circumstances prevailing at the time. A refunding agreement was made with Panama City on

able trouble myself trying to determine from this indictment what they are charged with, and I am supposed to be a little more versed in the interpretation of an indictment than the defendants would be, so I wish you would try to tell me just what you have charged these defendants with in this indictment." (R. 116.)

May 22, 1942. (R. 6.) It would be a matter of common knowledge that at this date economic conditions throughout the nation had measureably improved. It appears from an exhibit contained in the indictment (R. 30-35) (the verity of which is not challenged) that on June 12, 1942, after the making of the refunding agreement above referred to, in a general letter addressed to all Panama City bondholders, the improved economic conditions in the Panama City area, which had developed since petitioners' purchase of the coupons, were called to the attention of the bondholders. Bondholders who had previously released their coupons to the defendants at the 2% and 3% price, respectively, were then offered the opportunity, or choice, to reclaim their coupons at the price previously paid to them and instead to pay to defendants an expense charge—which is not claimed by this indictment to have been unreasonable. If, as the United States says, the scheme which it seeks to allege was a scheme to mulct investors not of the *principal* of their bonds, but rather of *interest*, then the exhibits contained in this indictment are certainly wholly inconsistent with and completely negative any inference of fraud, civil or criminal, in respect of defaulted coupons. (R. 30-35.) This indictment carries on its face a refutation of its own charges.

In respect of the second species of false representations sought to be alleged, the allegations of the indictment are peculiarly indefinite and wholly unrelated to one another. It is said (R. 9) that the defendants represented to the Panama City bondholders that the defendants would represent the holders and collect the principal of and interest on their bonds for a litigation expense of 5% of the amount of principal and 10% of the amount of interest collected. It is nowhere alleged in the indictment that (1) the defendants actually charged the bondholder with a greater amount

of expense, or (2) sought to charge a greater amount of expense, or (3) withheld money on the claim that the amount withheld was litigation expense. Instead there is asserted, at this point in the indictment, the vague and general charges heretofore referred to respecting the alleged failure of defendants to account for monies and refunding bonds collected in one of the suits. In addition to being vague, indefinite and general, such allegations are wholly unrelated to and do not constitute allegations to the effect that the litigation expense was ever misrepresented as such.

In respect of the refunding agreement which was entered into by the defendants with the City of Panama City on May 22, 1942, alleged by the indictment also to have been part of the scheme (R. 6-7), it appears that the city of Panama City issued new 30-year 4% refunding bonds which were exchanged for the (undescribed) City's bonds theretofore outstanding. (R. 7.) The indictment contains a charge—again stated in the vaguest of terms—that the defendants would not "protect" the interests of the bondholders by them represented. (R. 9.) There is not a single sentence in this indictment which challenges the wisdom or propriety of the refunding arrangements. Not a single allegation in this indictment asserts that in the making of the refunding agreement with the City the defendants did not adequately protect the interests of the bondholders. Nowhere is it claimed that a better bargain should have been procured. It is not claimed that the refunding arrangement was an improvident one for the bondholders, or, that a better deal was possible under the circumstances then prevailing. Quite to the contrary it appears from an exhibit contained in the indictment that the refunding agreement represented the culmination of a long fight on the part of the defendants to protect the interests of Panama City bondholders. The financial difficulties of Panama City were interwoven with the financial difficulties of its

home county, Bay County. (R. 31.) The City's problems could not be settled until the County's were first settled. Obstructionist tactics of one Bay County holder extending over a period of ten years (R. 31) "not only seriously jeopardized the success of the Bay County undertaking authorized in 1932, but constituted an insurmountable barrier to the Panama City problem, since the taxable resources of the City were responsible for approximately 50% of the liability which this single creditor was accumulating and attempting to enforce against Bay County." (R. 31.) The complete history of events leading up to the refunding agreement were set forth in the general letter to the bondholders. It completely negatives any fraud, civil or criminal. Attention is respectfully directed thereto. (R. 30-35.)

The indictment sets out nine letters (the letters in some counts being duplications of others). (R. 11-13; 13-15; 16-26; 36-41; 26-28; 28-36; 42-43; 50-51; 47-48; 48-50.)

When these letters are read in connection with the allegations of the indictment, and particularly in the light of the construction placed upon the indictment by the United States, they show on their face that they could not have been in execution of any scheme.

The false representations which are alleged to have constituted the scheme concerned representations to the effect that the City was providing funds to liquidate or purchase, at 2% and 3%, interest coupons which matured during the years prior to 1937, and during the years 1938, 1939 and 1940, whereas the defendants had in fact provided the funds. (R. 8.)

The indictment makes *no* claim of *any* false representations with respect to interest coupons maturing during the years 1941 and 1942.

The indictment letters contained in Counts 2, 3, 4, 7

and 8, are all dated at some time in 1942. They propose to pay to the addressee named, his or her defaulted 1941 interest coupons *at the original coupon rate of* 6%. Such being the case, these indictment letters could not possibly have furthered that scheme which is sought to be alleged. It is not *every* letter that is mailed, even in connection with an alleged scheme, that constitutes a misuse of the mails (*Kann* v. *U. S.*, 323 U. S. 88); it is only those letters which further the scheme. In the case of the indictment letter in Count 2, in addition to paying the 1941 coupon at the original rate of 6%, it paid a small balance of the 1940 defaulted interest at the rate of 3%. The letter shows on its face that the check enclosed is the check of R. E. Crummer & Company, one of the corporate defendants, and therefore could have constituted no deception as to source of payment. In the case of the indictment letters and exhibits contained in Count 8, it appears from the face of the instruments that coupons which had matured in 1939 and 1940—and were the only coupons received by the defendants with the bonds being accounted for in the letter (R. 44)—were accounted for and paid for to the addressee at the original 6% rate.

The indictment letter contained in Count 1 related to the *principal* of a bond of the addressee which had been reduced to judgment. (R. 11.) Since respondent concedes that the scheme sought to be alleged did not concern any of the *principal* of any bonds, the letter could not have been in furtherance of the scheme charged.

The indictment letter in Count 6 deserves special mention. This letter forwarded to the addressee indicated, the lengthy report of June 12, 1942, concerning the refunding agreement that had been signed with Panama City on May 22, 1942, referred to earlier in another connection. The letter *particularly invited* the addressee's attention to a

reading of the enclosed report in respect of the terms on which the new refunding bonds were issued. Such a letter indicates on its face that it could not possibly have furthered any species of fraud, either civil or criminal.

The indictment letters in Counts 9 and 12 are related papers. Tersely stated, the *principal* of the bonds had apparently been turned in to the defendants under one name; the defaulted *interest* coupons under another name. When the confusion was being straightened out by the defendants they remitted for the coupons at the original coupon rate of 6%, less a collection charge of 10%. At the oral argument in the District court (*dehors* the record, but in response to a question of the District Court) the United States attorney, with expressed reluctance, explained to the District Judge that the government's criticism in this particular case, is not that there was *no* accounting for the coupons reduced to judgment, but rather that *in making the accounting* and computing interest, interest upon interest had not been considered. (R. 135, 136.)

The indictment letters set forth in Counts 10 and 11 are merely intra-office communications or memorandums which quite obviously could not have affected the scheme one way or the other.

The general allegation usually found in indictments of this type, to the effect that the letters were in execution of the scheme, cannot be relied upon to sustain an indictment where, as here, when read in connection with the remaining averments of the indictment, their ineffectiveness for any such purpose appears from the face of the instruments themselves.

When more than one scheme is alleged in a single count of an indictment, it is bad for duplicity. The scheme alleged here could not have been, as this indictment undertakes to charge, a unitary scheme conceived on January 1, 1931. (R.

2.) One scheme, alleged to have commenced about May 1, 1931, was to operate during the economic depression and was to assemble securities either in the hands of a Bondholders' Committee or under representation agreements—it is not clear which—and involve them in litigation. That contemplated the coercive processes of the courts. Another scheme, eleven years after the alleged inception of the vague basic scheme,was the refunding under the agreement of May 22, 1942, of securities not already merged in judgment. The latter contemplated voluntary liquidation. It became effective during the years of war prosperity and did not involve judicial coercive processes. Charging the defendants, therefore, with having devised, in January 1931, a scheme or artifice which contemplated, at one and the same time, both the exercise of the coercive processes of the courts made necessary by an economic depression, and on the other hand with the voluntary processes of a refunding operation conducted under the conditions of war-boom prosperity, is to attribute to defendants an art of divination impossible to the human mind. The two conceptions are mutually antagonistic and make the charge duplicitous.

In conclusion, one special point, applicable only to The Crummer Company, remains to be stated.

The District Court sustained the demurrer of The Crummer Company to all except Count 9 of the indictment, on the additional ground that it affirmatively appeared from the indictment that the letters relied upon to show use of the mails had occurred before The Crummer Company was organized and before it was claimed to have become a party to the so-called scheme (R. 65). On the appeal to the Circuit Court of Appeals the Government specifically stated in its brief that it *did not* challenge this determination of the District Court—which limited the liability of The Crummer Company, if any, to Count 9 of the indictment. (f.n. R. 192.)

Therefore, as to The Crummer Company, only *one* count of this indictment was on review in the Circuit Court of Appeals. Notwithstanding the Government's position, the judgment of the Circuit Court of Appeals holds The Crummer Company to *two* counts, namely 8 and 9. This, The Crummer Company claims, is manifest error.

REASONS FOR ALLOWANCE OF WRIT.

First. In holding that the right of an accused to be informed by an indictment of the nature and cause of the accusation is not the same as to *all* of the constituent elements of the crime alleged, the decision of the Circuit Court of Appeals, reversing the judgment of the District Court, is in conflict with the Sixth Amendment and with the decisions of this Court.

Second. By being required to stand trial upon an indictment which is indefinite, vague and inconsistent in substantial particulars appertaining to an essential ingredient of the crime sought to be charged, the petitioners are deprived of the guaranty afforded to them by the Sixth Amendment to the Constitution of the United States.

Third. The Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings, requiring an exercise of this Court's power of supervision.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court as to all petitioners.

2. The Circuit Court of Appeals erred in reversing the judgment of the District Court as to The Crummer Company on Counts 8 and 9 of the indictment, because the United States appealed only from the District Court's determination in respect of Count 9.

PRAYER FOR WRIT.

Roy E. Crummer, Hewen A. Lasseter, Courtney S. Turner, William J. Meredith, James G. Martin, Vernon T. McCombs, Marjorie Schockley, Herbert Moon, Roy F. Preston, Carl A. Morawitz and R. E. Crummer & Company, a corporation, and The Crummer Company, a corporation, by the undersigned, their counsel, respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Tenth Circuit, to the end that the record of this cause be brought to this Court, that this cause may be reviewed and determined by this Court, and that your petitioners may have such other and further relief as the nature of this case may justify.

In support of this, their petition, they tender the supporting brief and argument of counsel hereunto annexed.

Respectfully submitted,

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SUPPORTING BRIEF.*

ARGUMENT.

I.

IN THE CASE OF THE CRUMMER COMPANY, THE GOVERNMENT SUBMITTED THE INDICTMENT TO THE CIRCUIT COURT OF APPEALS ON ONLY ONE COUNT. TO REVERSE THE DISTRICT COURT'S JUDGMENT ON TWO COUNTS IS THEREFORE MANIFEST ERROR.

It will be convenient to take up first that assignment of error which is applicable only to the case of The Crummer Company.

The order of the District Court, sustaining The Crummer Company's demurrer to the indictment, contained this additional paragraph (R. 65):

> "The Court further finds as to the defendant, The Crummer Company, a corporation, that as to all counts of the indictment except Count 9, the facts stated therein are alleged to have occurred before the defendant, The Crummer Company, is alleged in the indictment to have become a party to the alleged scheme to defraud, or for obtaining property by means of false pretenses, representations or promises."

On the appeal to the Circuit Court of Appeals the United States said in its brief filed in that court (R. 192):

> "Another ground for the Court's order, applicable *only* to defendant The Crummer Company, is that all

* Opinions Below, Jurisdiction, Questions Presented, Statute Involved, Statement of the Case, Specification of Errors Urged, which are set out in the Petition pages 2 to 18, *supra*, will not be repeated here.

counts of the indictment except Count 9 alleged facts occurring before the date defendant is alleged to have become a party to the crimes charged. *The Government does not challenge this determination of the District Court which thus limits The Crummer Company's liability to the charge made in Count 9.*" (Italics ours.)

In the Appellant's brief filed in support of its appeal in the Circuit Court of Appeals (certified by the Clerk and lodged here subjoined to the record (R. 191)) the United States did not assign nor argue any error in respect of the finding of the District Court which is set out above. On the contrary, in a footnote contained in its brief, it specifically stated that it did not challenge the determination of the District Court limiting The Crummer Company's liability under the indictment to that charge which is contained in Count 9 of the indictment.

As to The Crummer Company, therefore, Count 9 was the *only* count of the indictment which was brought before the Circuit Court of Appeals on the Government's submission of its appeal to that Court.

The action of the Circuit Court of Appeals in reversing the judgment of the District Court on *two* counts, namely, Counts 8 and 9, is not consistent with the issue as it was presented by the appeal, approximates a voluntary action on the part of the Court, and so departs from the usual course of judicial proceedings as to require the supervision of this Court.

It is a familiar rule that statements and admissions made in briefs filed on appeal are binding in that Court on the party in whose behalf the brief is filed. *United States* v. *Fifteen Cases*, 35 F. (2d) 183; 24 C.J.S. § 1845, p. 700; 4 C.J.S. § 1343, p. 1936.

II.

IT IS CONTRARY TO THE PROVISIONS OF THE SIXTH AMENDMENT TO CONSIDER THIS INDICTMENT FROM THE VIEWPOINT THAT THE SCHEME OR ARTIFICE MAY BE PLEADED WITH LESS PARTICULARITY THAN THE CHARGES WITH RESPECT TO THE USE OF THE MAILS.

The Circuit Court of Appeals conceded that the indictment in this case is lacking in some allegations, wanting in clarity, and confusing in its attempted statement of the alleged offense. (R. 169.) Nowhere in the opinion of the Court (R. 161-171) were the defects in this indictment, which were pointed out by the petitioners, dismissed by the Court as either insubstantial or unimportant. Nevertheless, the Circuit Court of Appeals appears to have been moved to reverse the judgment of the District Court, in part, on the ground that while the offense charged in the indictment is composed of two constituent elements and has its genesis in the scheme to defraud, "the very gist of it" is the use of the mails in executing the scheme or attempting so to do (R. 168); that accordingly, the scheme, though necessary to be described, need not be pleaded with all the certainty requisite in charging the use of the mails. (R. 168.) Judging the indictment from that viewpoint it directed a reversal of the District Court.

The judgment of the Circuit Court represents acceptance of a philosophy frequently encountered in respect of indictments brought under the Mail Fraud Statute. In this case it was pressed by respondent upon the Circuit Court of Appeals with both expertness and vigor. That philosophy argues that in dealing with an indictment under the Mail Fraud Statute it must be always borne in mind that the "gist of the offense" is the unlawful use of the mails, and not the scheme to defraud; that the statute's

primary purpose is to preserve the integrity of the mails service; that since the use of the mails is the "gist of the offense" each separate mailing will constitute a separate and distinct crime; and finally, that while the use of the mails *must* be pleaded with certainty, and the accused *must* be informed by the indictment of the time, the place and the circumstances of the mailing with accuracy, candor and clarity, he need *not* be informed with like clarity, nor with like certainty, concerning the alleged conduct which is said to have made his use of the mails criminal in character; that is because, as the respondent said below, the scheme or artifice was not of "the crux of the crime." (R. 203.)

Except for the proposition that the Mail Fraud Statute is designed by the Congress to protect the mails, and that each mailing constitutes an offense, petitioners challenge both the accuracy and constitutionality of this philosophy. Uttered on some occasion where, by virtue of its setting, there was little peril, it has been so often repeated that it has become a dangerous cliché. It is now affirmatively employed as though it were a rule of construction which can be brought to bear to excuse and justify indictments, which, like the one at bar, afford scant recognition of the right of an accused to be adequately and properly informed in respect of *all ingredients* of the offense charged.

It represents a false philosophy of law. It is false because it contemplates that, in the consideration of indictments, there shall be applied one standard of pleading to what is always conceded to be an essential ingredient of a Federal offense, and less definite standard of pleading to the other ingredient. Such reasoning saps the vitality of the Sixth Amendment and leads to erroneous results. Petitioners doubt that it has ever been directly sanctioned by, and deem it contrary to, decisions of this Court of long standing.

In the case of *United States* v. *Cook*, 17 Wall. 168, 174 (U. S. 1872), this Court said: "Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, * * * as it is universally true that no indictment is sufficient if it does not accurately and clearly allege *all the ingredients* of which the offence is composed." (Italics ours.)

In the case of *United States* v. *Hess*, 124 U.S. 483, 487, an indictment brought under the Mail Fraud Statute (at a point in its development when its text was limited to schemes or artifices to defraud) this Court held that it was insufficient to charge the offense in the words of the statute; that the indictment must state the species—must descend to particulars. "For this, facts are to be stated, not conclusions of law alone." *United States* v. *Hess*, *supra*.

In the case of *Evans* v. *United States*, 153 U.S. 584, 587, this Court said: "The crime must be charged with *precision and certainty*, and *every* ingredient of which it is composed must be accurately and clearly alleged." (Italics ours.)

Referring to the differences between earlier statutes and the present Mail Fraud Statute, in the case of *United States* v. *Young*, 232 U.S. 155, 161, this Court said: "the elements of *an offense* under § 215 are (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment." (Italics ours.)

Petitioners submit, therefore, that there is no basis for the view that the elements of this offense can be differently treated for the purpose of pleading the crime or any

other purpose. The "very gist" of the Federal offense is not *the use of the mails*—it is the use of the mails as part and parcel of, *and in connection* with, the so-called scheme or artifice to defraud. The offense stated by the Federal statute is integral. Isolate its constituent elements, and then there is no Federal offense. *Every ingredient* of which the offense is composed must be accurately and clearly alleged and with precision and certainty. *United States* v. *Cook; United States* v. *Hess, Evans* v. *United States, supra.*

To approach the consideration of an indictment under Section 215 therefore from the viewpoint and to say (R. 168) that defendants in mail fraud cases are entitled, in an indictment, to adequate and specific information in respect of the use of the mails, but *are not* entitled to be informed with like clarity and particularity in respect of the so-called artifice or scheme, is contrary to the decisions of this Court. It undertakes to apply one standard of pleading to one essential ingredient of the Federal offense and a different and less rigorous standard of pleading to the other essential ingredient. It grants the defendant his full constitutional guaranty as to one essential ingredient of the crime and withholds from him his full constitutional guaranty as to the other. Such an approach is not consistent with either the letter or the spirit of the Sixth Amendment.

In the case at bar the result of the application of this false philosophy by the Circuit Court of Appeals to the indictment returned against these petitioners is to deny to them a clear, direct, unequivocal statement of those facts, which, in the mind of the prosecutors, went to convert a legitimate commercial transaction into a so-called scheme or artifice to defraud, and to require them to accept a generalized version which amounts merely to charging the offense in the words of the statute itself.

The widespread repetition of this philosophy enables the United States to concede, as it did in this case, that an indictment might have been more "artfully drawn" or that it is "inartificial," etc., but the accused may *not* be heard to complain, for the reason that the respondent is *not* required to inform the defendant of the "nature and cause of the accusation" in respect of the so-called scheme with that same clarity, directness and simplicity that is the case in respect of allegations concerning the use of the mails. We submit that the doctrine is pernicious and provocative of unconstitutional procedures.

Entirely aside from the salutary requirements of the Amendment, what sound reason can there be to support the view that allegations respecting the scheme or artifice may be viewed with an indulgence which will be inappropriate when scanning the allegations concerning the use of the mails? It is an axiom of pleading in civil cases, too well settled to need more than mention to this Court, that fraud is never presumed; that *mere general averments*, without setting out *the facts* on which the charge of fraud is to be predicated, is wholly insufficient. In civil pleading it *must* be made to appear by the facts alleged, and independent of conclusions of the pleader, that fraud is present. 37 C.J.S. § 78. Should the requirements be less in criminal cases where the liberties of individuals are at stake?

Certain general principles referred to by the Circuit Court of Appeals are not denied. Petitioners do not dispute the view that an indictment need plead only ultimate facts. Details of evidence need not be supplied by an indictment. Nor is there any dispute, that, as the Circuit Court observed (R. 166), by settled rules of criminal pleading a defendant is informed of the nature and cause of the accusation against him if

the indictment charges *all* of the essential elements of the offense with *sufficient completeness and clarity* to apprise him of the crime charged with such reasonable certainty as will enable him to provide for and make his defense and plead a judgment of acquittal or conviction, as the case may be, in bar to a future prosecution for the same offense. Petitioners consider that the Circuit Court failed to apply this rule when testing the indictment in this case—but that it is a correct statement of an appropriate general rule admits of no question.

On the other hand, there are certain other general propositions equally well settled and equally applicable to this case. The constitutional right of an accused individual "to be informed of the nature and cause of the accusation" contemplates that the indictment shall set forth the facts constituting the offense "with clearness and all necessary certainty." *United States* v. *Mills*, 7 Pet. 137, 142. (U. S. 1833.) Every ingredient of which the offense is composed must therefore be accurately and clearly alleged. *United States* v. *Cruikshank*, 92 U. S. 542, 557; *United States* v. *Cook, supra.*

An indictment, however, which charges the offense in the words of the statute itself, or, like the indictment in this case, when its essential allegations, fairly construed, add up merely to charging the crime in the words of the statute, is insufficient. *United States* v. *Hess, supra.*

Lastly, but certainly by no means least, the indictment must be construed in the light of the presumption of innocence that attends upon the accused throughout all stages of a criminal proceeding and until a verdict of guilty shall have been returned. An indictment, on demurrer, must be considered on the presumption and from the viewpoint, that the defendant *does not know* the facts that

the prosecutor thinks makes him guilty; that he is unable to procure and present evidence in his defense of the charge and is deprived of that fair opportunity to defend, contemplated by the Amendment, unless the indictment discloses the facts constituting the claimed offense with clearness and with candor. *Lynch* v. *United States,* 10 F. (2d) 947, 949.

This case is *not* the case of a transaction whose essential *nature, object* or *purpose,* was criminal, and where a mere general statement is sufficient to identify for the court and for the defendant wherein the transaction constituted a scheme or artifice to defraud. This is a case where it appears from the face of the indictment that the nature, object and purpose of this transaction was *lawful*—where the accused individuals were engaged in and conducted a legitimate commercial transaction. It involved the risk of their own capital and efforts and *never* any of that of the investors represented by them. That it produced a final result—in the form of a refunding agreement—which was satisfactory to all concerned, is conceded. It is now sought to assail that transaction by an indictment which, not descending to particulars, the District Judge found vague, indefinite and inconsistent and to which both the respondent and the Circuit Court of Appeals themselves apply their own particular criticism. Nevertheless it is sustained. To require the petitioners to plead to and go to trial on such an indictment, on the philosophy that the prosecutor is not required by law to state his case with respect to the so-called scheme or artifice to defraud element of the offense, with the same degree of particularity that he is required to state his case with respect to the mailing of the letters, is, we submit, an unconstitutional solution of the problem.

III.

ELIMINATING CONCLUSIONS OF THE PLEADER, THE REMAINING AVERMENTS OF THE INDICTMENT ADD UP MERELY TO A GENERAL CHARGE IN VIRTUALLY THE LANGUAGE OF THE STATUTE ITSELF.

The indictment in the case at bar does not descend to even reasonable particulars—and by particulars is meant ultimate, not evidentiary, facts.

For example, neither at its outset nor at any other place in the indictment is there *any* description of the Panama City bonds which the indictment claims it was the object of the so-called scheme to obtain from the class of persons to be defrauded. (R. 2, 4.) Nor is there any description of the "other securities" which it is likewise said were held by the class of persons to be defrauded. (R. 2.) In those paragraphs of the indictment (R. 5, 9) which undertake to charge defendants with a failure to account for all the proceeds of either a judgment or judgments, there is nowhere any allegation of what or whose bonds were included or involved in either of the cases referred to; nor, as the District Court observed at the hearing, whether the refunding bonds said to be obtained were the same bonds referred to in the refunding agreement later mentioned. It is not alleged that the defendants did not themselves have any interest in the bonds or coupons involved in the judgments. There is no statement of any amount which, under respondent's theory of the indictment, it is claimed was misappropriated.

Petitioners respectfully submit that it is idle to suggest that matters of this kind are not of the substance of the scheme alleged or that it is not imperative for these defendants to be clearly informed of such matters, both in order that they may prepare their defense, and in order

that they may be protected by any ultimate verdict reached.

If one test of an indictment is whether the record of a judgment of acquittal on that indictment can be pleaded in bar to a future prosecution, how can a judgment of acquittal on the indictment in this case be of any protection to these petitioners in the event of a second indictment naming a specific series of Panama City bonds, stating the names of those persons whose bonds were claimed to have been involved in the judgment, but relying upon and pleading *different* letters and thus a different use of the mails? How could these defendants adequately show by the record of this indictment and a verdict of acquittal thereupon that it was the *same* scheme and that the new indictment merely had different indictment letters. The false notion that the use of the mails is the "very gist of the offense" and the scheme relatively unimportant, would rise again to subject the petitioners to unnecessary hardship.

Reference has been made in the Statement of the Case to deficiencies in the allegations concerning a Bondholders Protective Committee. In respondent's brief filed in the Circuit Court of Appeals—and therefore we assume the same will be said in answer to this petition—the respondent argued that the defendants used the Committee "as a device to get control of" Panama City bonds and interest claims; that they did not disclose to investors the extent to which, under the Agreement, investors had surrendered their rights to the Committee. (R. 208.) That argument is of the substance of the charge. Defendants are entitled to be fairly informed by the indictment in respect of it. The Government, therefore, is challenged to point out to this Court a specific allegation of fact which will unequivocally support the argument that the Com-

mittee was employed "as a device to get control of" Panama City bonds.

It will not do to say that some such meaning can be wrested from the equivocal text of the indictment by straining at a sentence here and a word there. Of course it is true that an indictment must be read as a whole. It does not follow, however, that under the Sixth Amendment a charge may be produced from an indictment by straining at its text. It is not a question of what meaning may lurk in a word here and a phrase there. The allegations are to be plain and the meaning direct and obvious. If constitutional guaranties are to have any vitality or meaning, then indictments should and must be so drawn that the lowliest person in the land, standing at the bar of a Court, unaided by counsel, possessed of normal faculties, can hear an indictment read to him and be then prepared to say "yes" or "no" to the charges. Lest the argument of the petitioners be looked upon as unjustifiable and biased, may we respectfully point out that the alert and experienced Judge of the District Court, charged with the responsibility of presiding over the trial of the accused, was forced to say: "• • • I am unable to determine from the indictment just what part the Bondholders Committee played in this transaction • • •" (R. 124.)

In connection with the institution of the suits upon the Panama City bonds and coupons (undescribed), apparently the theory of the indictment is that the petitioners acted on written representation agreements and powers of attorney signed by the bondholders and delivered to the defendants. If that is so, then it would appear that the Government's theory of its case is, not that the defendants acted through the medium of a Bondholders Protective Committee, but acted upon the authority of written

instruments of representation. In any event, it is said (R. 4) that the bondholders were "falsely and fraudulently" induced to sign the said written instruments of authority. But these petitioners are not informed of *any* facts, either ultimate or evidentiary, on which rests the conclusion expressed in the indictment that such vital instruments of representation were "falsely and fraudulently obtained." Later reference to so-called false representations is in connection with the delivery of bonds or coupons and is unrelated to the delivery of the instruments of representation. Allegations couched in identical language were condemned in the case of *Yuen Boo Ming* v. *United States*, 103 Fed. (2d) 355, at page 357.

The limitations of this petition will not admit of more extended discussion, but the impropriety of permitting valid commercial transactions to be assailed by vague and indefinite indictments brought under the Mail Fraud Statute is given emphasis by reason of other facts appearing on the face of the indictment.

Since there is no contention on the part of the respondent that any investors were mulcted of the principal of their investment, it follows that as a direct result of the work of petitioners each holder of a $1,000 Panama City bond recovered $1,000 of his principal. The restoration of any defaulted indebtedness, municipal or private, from the despairing levels of the economic collapse of the 30s, to a position of 100% recognition and stability and the procuring of a compromise interest rate of 4%, with all that such a result implies in the way of reconciling the conflicting and difficult points of view of creditors and debtor alike, is, in and of itself, no small accomplishment. Its significance, on the consideration of this indictment, is, that its achievement could not have been accomplished by individuals who were engaged in perpetuating a scheme or artifice to defraud.

In addition, each such holder who turned over his defaulted coupons to the defendants at the respective rates of 2% or 3%, as the case might be, recovered, as a direct consequence of the activities of the defendants and from the defendants, and at a time when the nation had not yet emerged from its financial difficulties, 33% on his interest (averaging the rates), prior to and through July 1, 1939, 50% on his interest through the year 1940 and 100% on his interest for the years 1941 and 1942. On the consideration of this indictment the significance of the defendants' investment is that it, too, is inconsistent with the theory that the transaction complained of constituted a scheme or artifice to defraud. It was more than five years after such investment that a refunding agreement was reached with the officials of Panama City. Men who are engaged in the prosecution of a scheme or artifice to defraud usually want their money right now--not five or more years later.

When, in 1942, the United States in general, and the Panama City area in particular, emerged from its difficulties and wartime activity replaced the economic stagnation of the 30s, the petitioners then notified their bondholders that as a consequence of the improved economic conditions they stood to profit by their earlier purchase of the defaulted coupons. (R. 34.) They then offered to resell such coupons to the individual bondholders at the price previously paid and to accept instead, and in lieu thereof, a charge for their services, the amount of which is not condemned by this indictment as unreasonable or unfair. Such conduct can be neither civilly nor criminally culpable. To reduce such a transaction to the level of the kind of scheme or artifice contemplated by the Mail Fraud Statute, the prosecutor should be obliged to set forth with greater specification of facts than is here contained the specific facts and theory

upon which he relies. He should be required to plead his indictment with particularity as to time, place and circumstance and not by conclusions, which, unaccompanied by specific facts, amount to mere expletives.

The failure to require him to do so amounts to a denial of a constitutional right.

IV.

BILLS OF PARTICULARS CANNOT BE AVAILED OF TO CURE SUBSTANTIAL DEFECTS IN AN INDICTMENT.

In the Circuit Court of Appeals respondent pressed home a subsidiary contention that the allowance of a bill of particulars was the solution for the ills of this indictment. That argument left its mark on the opinion of the Circuit Court. (R. 169-170.)

The matters pointed out by petitioners are not mere matters of evidentiary detail. They go to the substance of the charge.

It is a fundamental proposition of criminal pleading that a bill of particulars cannot give life to a bad indictment. The indictment must stand on its own feet, unaided by a bill of particulars. *United States* v. *Illig*, 288 Fed. 939, 942. That which should affirmatively appear from the face of an indictment can never be supplied by a bill of particulars. *Collins* v. *United States*, 253 Fed. 609, 610 (CCA 9); *Jarl* v. *United States*, 19 F. (2d) 891, 894. A bill of particulars is appropriate only where there is a good indictment, and that which the defendants asked to be informed of concerns matters of evidentiary detail. *Foster* v. *United States*, 253 Fed. 481, 483 (CCA 9). It is also well settled that a defendant is not entitled to a bill of particulars as a matter of right. Its allowance or denial is wholly within the discretion of the trial judge. On review that discre-

tion is rarely, if ever, reviewable. *Wong Tai* v. *United States*, 273 U. S. 77.

The very fact that the allowance of a bill of particulars is a matter of discretion, conclusively demonstrates that it may not be used as a means of supplying the deficiencies which exist in the indictment in this case. Those deficiencies go to matters which are essential elements of the indictment. If they are essential they must be in the indictment itself. The defendant is entitled to have them included in the indictment as a matter of right and without any possible conditions. If his ability to obtain them through a bill of particulars is contingent, as it unquestionably is, on the discretion of the trial judge allowing a bill of particulars, then the defendant may or may not obtain that information. If he does not obtain it he has not been given his constitutional protection. Therefore, it must inevitably follow that an indictment which does not contain the essentials, measured by the foregoing standards is demurrable.

The Government has not contended that the indictment contains all of the essential elements. By inference at least it concedes that it does not. It tries to cure that defect by suggesting that possibly the defendants may, if the trial court agrees, obtain information as to the omitted essentials through a bill of particulars. The very statement of its position is a confession that the Court of Appeals was in error in holding the indictment sufficient.

The sufficiency of an indictment, therefore, is to be considered and determined without reference to the possibility that if the demurrer be overruled a court *might* direct the filing of a bill of particulars. The suggestion contained in the opinion of the Circuit Court of Appeals in this case (R. 170), that the "remedy" of the petitioners *was* to make application for a bill of particulars, is based upon a misconception of its function.

V.

THE INDICTMENT IS BAD FOR DUPLICITY.

An indictment charging use of the mails to defraud may charge but a single scheme in each count, and if it sets forth more than one scheme in a count it is duplicitous. *U. S.* v. *MacAlpine,* 129 F. (2d) 737; *Simons* v. *U. S.,* 119 F. (2d) 539, 548. It taxes one's credulity to accept as even *prima facie* sound, the charge of this indictment (R. 2) that there existed here a unitary scheme or artifice, devised by the petitioners on or about January 1, 1931, and extending for a period of thirteen years, during which period both the greatest economic collapse and the greatest war of all time came and went. The indictment represents an effort of the prosecutor to merge two mutually antagonistic theories of scheme into one single charge. One scheme, alleged to have commenced in 1931, arose at the depth of the depression out of a condition of municipal insolvency. The other scheme, in 1942, arose out of a condition of solvency restored by wartime prosperity. The two schemes—eleven years apart—were and are utterly unrelated to each other. The averments of the indictment concerning employment of temporary representation agreements, Bondholders Protective Committee, and resort to Municipal Bankruptcy Act, obviously envisaged solution of the bondholders' problems and a liquidation of the indebtedness achieved through the coercive processes of the courts. The second scheme, alleged in the same count, arose under entirely different circumstances and was made possible by unpredictable conditions subsequently arising. The second scheme was to refund by voluntary agreement the obligations of Panama City under the agreement of May 22, 1942. (R. 6.) Wartime prosperity had then replaced a depression. Coercive measures were not necessary.

To charge, as does this indictment, that when the first scheme began (R. 2) the defendants could possibly have de-

vised a unitary, integrated scheme to defraud someone eleven years later, under the unforeseeably different conditions existing in 1942, and that all this mass of generalities is just *one* scheme, is to assert an art of divination impossible to the human mind. The first coercive scheme by judicial process during insolvency in 1931 was incommiscible by the human mind with the unforeseeable second voluntary cooperative scheme during solvency in 1943.

Conclusion.

Recently, in the case of *Kann* v. *U. S.*, 323 U. S. 88, 95, this Court recognized that the use of the mails was but "one element of the offense defined by the statute * * *" The scheme or artifice to defraud is, of course, the *only* other element. There can be no valid reason for a rule of law which will differentiate between these two elements for the purposes of a criminal indictment or a trial thereupon.

For the reasons hereinbefore in the petition and this supporting brief assigned, it is respectfully submitted that the petition for writ of certiorari should be allowed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 762

ROY E. CRUMMER, HEWEN A. LASSETER, COURTNEY S. TURNER, WILLIAM J. MEREDITH, JAMES G. MARTIN, VERNON T. MCCOMBS, MARJORIE SHOCKLEY, HERBERT MOON, ROY F. PRESTON, CARL A. MORAWITZ, R. E. CRUMMER & COMPANY, A CORPORATION, AND THE CRUMMER COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 161–171) is reported at 151 F. 2d 958.

JURISDICTION

The judgment of the circuit court of appeals was entered November 2, 1945 (R. 171–172), and a petition for rehearing was denied November 19,

1945, one judge dissenting, without opinion (R. 184). The petition for a writ of certiorari was filed January 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

1. Whether the scheme to defraud alleged in the indictment is set forth with sufficient particularity, completeness, and clarity to enable petitioners to prepare their defense.

2. Whether the indictment is duplicitous as alleging distinct schemes to defraud.

3. Whether the mailings alleged in the indictment show on their face that they were not in furtherance of the scheme to defraud.

4. Whether the circuit court of appeals erred in reversing the judgment of the district court as to petitioner The Crummer Company on count 8.

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[1] As the petition seeks to review a judgment of the circuit court of appeals entered pursuant to an appeal by the Government under the Criminal Appeals Act, as amended (see footnote 2, *infra*, p. 4), it does not involve a criminal proceeding in which there has been a verdict, finding of guilt, or plea of guilty; consequently, it would seem that the applicable period for applying for certiorari is the three-month period allowed by Section 8 (a) of the Act of February 13, 1925, as amended (28 U. S. C. 350), and not the thirty-day period prescribed in Rule XI of the Rules in Criminal Cases. Cf. *United States ex rel. Coy* v. *United States*, 316 U. S. 342.

STATUTE INVOLVED

The pertinent provisions of Section 215 of the Criminal Code, the mail fraud statute (18 U. S. C. 338), are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction * * * any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

A twelve-count indictment (R. 1–52), charging use of the mails in execution of a scheme to de-

fraud, was returned against petitioners in the United States District Court for the District of Kansas on August 3, 1944. On demurrers (R. 52–64) all counts were held defective as to all petitioners on the ground "that the indictment * * * is indefinite, uncertain and inconsistent and does not sufficiently advise the defendants, or any of them, of the nature of the charge attempted to be alleged against them, or any of them." As to petitioner The Crummer Company, all counts except count 9 were held defective on the additional ground that "the facts stated therein are alleged to have occurred before the defendant, The Crummer Company, is alleged in the indictment to have become a party to the alleged scheme to defraud." (R. 64–65; see also R. 158.) On appeal by the United States to the Circuit Court of Appeals for the Tenth Circuit,[2] the judgment of the district court as to all petitioners except The Crummer Company was reversed. As to The Crummer Company, the judgment of the district court was reversed as to counts 8 and 9 and affirmed as to all other counts, the court below holding that in respect of count 8,

[2] The Criminal Appeals Act, as amended by the Act of May 9, 1942, c. 295, § 1, 56 Stat. 271 (18 U. S. C., Supp. IV, 682), permits, *inter alia*, an appeal to the circuit court of appeals from a judgment sustaining a demurrer to an indictment, except where the judgment "is based upon the invalidity or construction of the statute upon which the indictment * * * is founded."

as well as count 9, the mailing alleged occurred subsequent to the time the company was organized and came into existence. (R. 161–172.) The court below thus held counts 8 and 9 good as against The Crummer Company, and all counts sufficient as against the remaining petitioners.[3]

Since petitioners contend, *inter alia*, that the indictment is insufficient to charge a fraudulent scheme, we summarize here the allegations in that respect as set forth in count 1 and incorporated by reference in the remaining counts.

It is alleged at the outset that from on or about January 1, 1931, until the date the indictment was returned, petitioners devised and intended to de-

[3] As stated by the circuit court of appeals (R. 166), "The grounds of demurrers were broadly that the indictment and each count thereof was vague, indefinite, ambiguous, and uncertain; that it failed to allege facts sufficient to inform the defendants of the nature of the charges and accusations; that it was duplicitous; and that none of the letters or writings charged to have been sent through the mails was designed, calculated, or proposed to execute the scheme." The district court sustained the demurrers as to all defendants solely on the ground that the indictment is indefinite, uncertain, and inconsistent, and does not sufficiently advise petitioners of the nature of the charge attempted to be alleged against them (R. 65), and did not rule on the other alleged defects urged in the demurrers. The appellate court, however, held not only that "the indictment and each count thereof charged the essential elements of the offense with sufficient fullness, clarity, and particularity" (R. 169), but also that there was no duplicity, and that it did not affirmatively appear that the letters allegedly mailed were not in furtherance of the fraudulent scheme charged (R. 170–171).

vise a scheme to defraud 24 named individuals, corporations, and institutions, and others unknown to the grand jury, who were desirous of recovering their money and property theretofore invested in the municipal bonds and other securities of the City of Panama City, Florida (R. 2). The allegations as to the details of the scheme are as follows:

In 1931 and thereafter, Panama City, Florida, was in default on its municipal bonds and interest obligations. On or about May 1, 1931, petitioners organized a Bondholders' Protective Committee, pursuant to an agreement which provided that holders of securities designated by the committee might become parties to the agreement by depositing their securities with the Brown-Crummer Investment Company (hereinafter called Brown-Crummer Co.), or any of its designated agents. (R. 3; Par. 2.) On or about September 1, 1931, petitioners amended this agreement to provide that the depositing of a security by a bondholder would constitute a complete assignment and conveyance thereof to the committee. Petitioners withheld from the investors the terms of this agreement. (R. 3; Par. 2.)

At all times hereinafter mentioned, the committee was completely controlled and dominated by petitioners, as were also the three corporations through which petitioners conducted their operations (R. 2–4; Pars. 1 to 4, incl.). These corporations were Brown-Crummer Co., R. E. Crummer

& Co. (organized by petitioners in 1934) and The Crummer Co. (organized by petitioners in 1942), all of which dealt in municipal bonds (R. 3–4; Pars. 3, 4).

Petitioners proceeded to obtain the deposit of the Panama City bonds and past due interest obligations from the owners thereof under powers of attorney (R. 4–5; Par. 5), falsely representing to the depositors that they would collect for the benefit of the latter amounts due thereon at a cost of 5% on principal and 10% on interest collected (R. 9; Par. 11E).

Subsequently, petitioners involved the bonds and interest obligations thus obtained in litigation against Panama City in the Federal District Court for the Northern District of Florida, and recovered judgments thereon in two actions, Cause No. 160 and Cause No. 26, both styled *W. J. Meredith, et al.* v. *Panama City* (R. 5; Par. 6). Thereafter, petitioners deliberately withheld from the owners information concerning the judgments and the status of their securities which had become merged in the judgments (R. 4–5, 9; Pars. 5, 6 and 11E).

In order to convert to their own use and benefit the monies and other property obtained, petitioners from time to time falsely represented to their customers, including those who had signed the powers of attorney and had deposited with petitioners their bonds, coupons and claims for

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interest thereon which were merged by petitioners into judgments (R. 7; Par. 11), that Panama City could not pay the original coupon rate of 6% without impairing its refunding program (R. 7–8; Par. 11–A) and that the officials of Panama City were making funds available to cover liquidation, at 2%, of defaulted 5%, 6% and 7% coupons and accrued interest up to July 1, 1937 (R. 8; Par. 11–B), at 3% from July 1, 1937, to July 1, 1939 (R. 8; Par. 11–C), and again at 3% from July 1, 1939 to January 1, 1941 (R. 8–9; Par. 11–D). Pursuant to temporary representation agreements and extensions thereof, which petitioners obtained from their customers (R. 4–5; Par. 5), petitioners paid off these interest claims of their customers at the compromise rates of 2% and 3%, as heretofore noted, fraudulently representing that these settlements were being made by Panama City, whereas in fact, petitioners provided the money themselves (R. 8–9; Pars 11–B, C and D), and actually collected from the city in cash and new refunding bonds (dated January 1, 1942), pursuant to the terms of the refunding agreement (dated May 22, 1942), the full amount of these claims that had been merged into the judgments previously mentioned (R. 6–7, 9; Pars. 9 and 11–E).

In 1939, petitioners were able to secure from bondholders control over a large number of Panama City bonds by requesting their deposit for the pretended purpose of having interest payments

endorsed thereon in connection with an exchange of securities which defendants falsely represented the municipality to be effecting. Actually, it was unnecessary for bondholders to make these deposits, since the city was not effecting any exchange that year and no interest payments were being endorsed on said bonds (R. 10; Par. 11–G).

In Cause No. 160 petitioners obtained a judgment for $247,480.94, on which they collected $75,643.20 in cash and $241,605.55 in new refunding bonds (R. 9; Par. 11–E). The $241,605.55 in new refunding bonds was obtained pursuant to the agreement entered into by petitioners with Panama City officials on or about May 22, 1942, which provided for a refunding of the "outstanding indebtedness" of Panama City into new bonds, dated January 1, 1942, and due January 1, 1972, and bearing interest at the rate of 4% per annum (R. 6–7; Par. 9). Petitioners converted to their own use and benefit a large part of the cash and new refunding bonds thus obtained without accounting therefor, and without disclosing to the bondholders information concerning the judgment and collections made thereon (R. 9; Par. 11–E). Pursuant to the terms of the aforesaid refunding agreement, large amounts of these new refunding bonds were also collected on the judgment in Cause No. 26, a part of which petitioners fraudulently converted to their own use and benefit (R. 5, 6–7, 8–9; Pars. 6, 9, 11–B, 11–C, 11–D, and 11–E).

To induce the bondholders to part with their Panama City holdings, as previously described, petitioners, operating through Brown-Crummer Co. and R. E. Crummer and Co., conducted a campaign of misrepresentation and non-disclosure of relevant information by means of pamphlets, letters, circular letters, advertisements, and other writings, and by oral communications from themselves and their agents. By these means petitioners made numerous false and fraudulent statements and representations concerning the business of the above named companies, their assistance to bondholders in collecting the overdue obligations of Panama City, and their efforts and intentions regarding an early refinancing of the obligations of this municipality. (R. 5–6; Par. 7.) In addition, petitioners retained a staff of salesmen and agents to secure, through close personal contact, the trust and confidence of the bondholders, and thereafter, by false statements and recommendations, to obtain for petitioners the custody and control of their bonds and interest claims (R. 6; Par. 8). Throughout the entire scheme, petitioners falsely represented and pretended that they were following a policy of protecting their customers' interests, when in fact they did not intend to, nor did they ever, follow such a policy (R. 9; Par. 11–F).

The offenses separately charged in the twelve counts of the indictment are that for the purpose of executing and attempting to execute the fore-

going scheme petitioners placed and caused to be placed in the United States mails, to be sent and delivered by the post office establishment according to directions thereon, certain letters and other writings specifically described in the several counts.

ARGUMENT

1. Despite petitioners' attack upon the principle (Pet. 2–3, 17, 21–28), it is firmly established that "the gist of the offense [under the mail fraud statute] is the use of the mails and the scheme to defraud need not be set forth with such precision as if it were the gist of the offense." *Leche* v. *United States,* 118 F. 2d 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617. See also *Rude* v. *United States,* 74 F. 2d 673, 675 (C. C. A. 10), and cases cited; *Worthington* v. *United States,* 64 F. 2d 936, 938 (C. C. A. 7), and cases cited. We do not dispute, of course, that the scheme to defraud is an essential element of the offense and that it must be alleged "with all such particulars as are essential to constitute the scheme or artifice, and to acquaint [the defendant] with what he must meet on the trial." *United States* v. *Hess,* 124 U. S. 483, 486. See also *Worthington* v. *United States, supra.* We submit that, contrary to petitioners' contention (Pet. 28–33), the indictment here satisfies these requirements.

As the court below stated (R. 167), "in determining the sufficiency of an indictment challenged

by demurrer for being objectionably vague, indefinite, ambiguous, and uncertain, the whole thereof must be taken into consideration. Paragraphs or other parts are not to be segregated, set apart, and viewed alone without reference to other pertinent parts. All relevant parts must be brought into focus and considered in their totality." A careful consideration of the instant indictment as a whole discloses that the scheme charged was for petitioners to obtain control, as purported fiduciaries, of Panama City past due bonds and interest claims from the public holders thereof, thereafter to acquire ownership of the bondholders' interest claims for substantially less than their face amount by means of false representations and nondisclosure of facts, and, finally, after merging the bonds and interest claims into judgment and collecting thereon in full from the city, to convert fraudulently to petitioners' own use and benefit a substantial portion of the ultimate recovery. The allegations of the indictment pertaining to each of these elements of the scheme sufficiently apprise petitioners of the details thereof to enable them to prepare their defense.

Obtaining control.—This part of the scheme is alleged in the introductory paragraph and paragraphs 1 through 8, 11E, 11F, and 11G of count 1 (R. 2–6, 9–10). These paragraphs name individual bondholders and describe the bondholders as a class which was to be defrauded (R. 1–2), and allege that petitioners formed, dominated, and

controlled a bondholders' committee and various named corporations (R. 2–4) and hired a staff of salesmen and agents, all for the purpose of obtaining custody and control of the bonds and interest claims (R. 6). The various documents which petitioners prepared and used to obtain custody and control of the bonds and interest claims, including a bondholders' committee agreement and an amendment thereto (R. 3), powers of attorney, and temporary representation agreements and extensions thereof (R. 4–5), are designated, as are the various false and fraudlent representations, promises, and high-pressure devices by which petitioners obtained control of the bonds and interest claims, upon the pretense that such control would be exercised as representatives of the bondholders and to protect their interests (R. 5–6, 8–10).

Acquiring ownership of bondholders' interest claims for substantially less than their face amount by false representations and nondisclosure of facts.—This part of the scheme is alleged in paragraphs 11, 11A, 11B, 11C, and 11D of count 1 (R. 7–9). It is charged, in substance, that petitioners employed the pressure tactic of representing that Panama City could not pay the stipulated coupon interest rate without crippling its refunding program (R. 7–8) and at various times falsely represented that Panama City was making available funds to liquidate at 2% and later 3% defaulted interest coupons of 5%, 6%, and 7%, and

accrued interest. In fact, however, as is averred in these paragraphs, payment of the full coupon rate had no relation to the City's refunding program, and the funds supplied to liquidate the coupons were being provided, not by the City, but by petitioners. (R. 8–9.)

Converting to petitioners' own use a substantial portion of the amounts collected on the judgments obtained on the bonds and interest claims.—Paragraphs 5, 6, 7, 9, 10, and 11E of count 1 (R. 4–7, 9) set forth the charges relating to the culmination of the scheme to defraud the bondholders. Petitioners are therein charged with obtaining two judgments against Panama City on the bonds and interest claims committed to their custody and control, and collecting thereon large sums of money and refunding bonds of the City, converting a large part thereof to their own use and benefit (R. 4–6). It is averred that petitioners had represented that they would act for the bondholders "in any legal actions" for 5% of amounts collected on principal and 10% of amounts collected on interest, and, in this connection, it is further alleged that they withheld from the bondholders information concerning their collection of money and refunding bonds and refused to account to them therefor (R. 9). The suits in which the judgments were obtained are identified by case titles, numbers, and the name of the court (R. 5). The details of the collection on one of the judgments are given (R. 9). It is emphasized that

petitioners withheld information from the bondholders as to the status, value, and disposition of their bonds and interest claims, i. e., the obtaining of judgments and collections thereon (R. 5); that they misrepresented to the bondholders the facts concerning petitioners' negotiations with the Panama City officials for payment of their bond and interest claims; and that they ultimately converted to their own use and benefit a large part of the money and property to which investors were entitled (R. 7–10).

Petitioners' objections to the sufficiency of the indictment go merely to evidentiary details which, of course, are not required to be alleged; and, moreover, the allegations are not deficient in the respects which petitioners claim. Thus, petitioners assert that there is no description of the securities which were the object of the fraudulent scheme (Pet. 6–7, 28), and complain that therefore an acquittal on this indictment will be no bar to a subsequent prosecution on a second indictment naming a specific series of Panama City bonds and the persons defrauded, "but relying upon and pleading *different* letters and thus a different use of the mails" (Pet. 29). However, a different use of the mails would be punishable as a separate offense,[4] regardless of whether

[4] *In re Henry*, 123 U. S. 372; *Bozel* v. *United States*, 139 F. 2d 153 (C. C. A. 6), certiorari denied, 321 U. S. 800, rehearing denied, 322 U. S. 768; *Becker* v. *United States*, 91 F. 2d 550 (C. C. A. 9); *Stumbo* v. *United States*, 90 F. 2d

the same or a different scheme was relied upon, and petitioners would not be entitled to plead former jeopardy. Moreover, we think that reference to the securities in question as the "past due Panama City bonds and accrued interest thereon" (R. 4–5), which were involved by petitioners in litigation in "Cause No. 160 and Cause No. 26, both styled *W. J. Meredith, et al.* v. *Panama City,* in the United States District Court for the Northern District of Florida, Marianna Division" (R. 5), is more than adequate for petitioners' purposes in preparing their defense.

As petitioners state (Pet. 28), it is not affirmatively alleged that they had no interest in the bonds or coupons involved in the judgments; but the indictment charges (R. 5) that the scheme contemplated fraudulent conversion to petitioners' own use of monies and refunding bonds (proceeds from collection of the judgments) rightfully belonging to the persons to be defrauded,[8] thus alleging negatively that petitioners were not the sole and rightful owners of the securities.

Petitioners also claim (Pet. 8, 30–31) that no facts are averred to substantiate the allegation that the powers of attorney and representations were obtained fraudulently. That these docu-

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828 (C. C. A. 6), certiorari denied, 302 U. S. 755; *Spirou* v. *United States,* 24 F. 2d 796 (C. C. A. 2), certiorari denied, 277 U. S. 596.

[8] It is not apparent wherein the failure to specify the exact amount misappropriated (see Pet. 28) is significant.

ments were obtained fraudulently, however, is clearly implied in the allegations (R. 4–5) that it was part of the scheme in obtaining them, together with past due bonds and accrued interest thereon and past due interest coupons, to convert the interest obligations to petitioners' own use, to the loss and injury of the persons to be defrauded.

The part to be played by the Bondholders' Protective Committee is claimed to be insufficiently set forth (Pet. 7–8, 29–30). The fair import of the allegations in this regard is, we submit, that petitioners planned, through their complete domination and control of the committee and of the named corporations (R. 2–3, 3–4) (which were organized to deal, *inter alia,* in Panama City municipal obligations), to get control of the bonds and interest claims and to withhold from investors the extent to which, under the committee agreement, the investors had surrendered their rights when they deposited their securities with the corporations (R. 3). The substance of the agreement, and the information withheld and the length of time the committee was used to further the scheme and the time when it was abandoned in favor of other devices employed to gain control of the bonds and interest claims, would constitute evidentiary matter, which need not be supplied by an indictment.[6]

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[6] That the committee played an important part in the scheme is indicated in petitioners' letter of June 12, 1942 (R. 30–35), wherein the committee was referred to as the

Contrary to petitioners' assertion (Pet. 10), the indictment does set forth sufficiently the connection between the refunding agreement and the bonds involved in the earlier litigation in the Florida federal court. Paragraph 6 of count 1 (R. 5), after setting forth the reduction by petitioners of the past due bonds and interest coupons to judgments, states that petitioners "did collect from Panama City large sums of money and new refunding bonds" on account of both judgments. And the refunding program of 1942 (R. 6–7) is the only one mentioned in the indictment.

The allegations in paragraph 11B, 11C, and 11D (R. 8–9), to the effect that petitioners represented to the defrauded persons that the City was advancing funds to liquidate at 2% and 3% the defaulted 5%, 6% and 7% interest coupons, when, as a matter of fact, petitioners had provided the funds themselves, are claimed (Pet. 11) to be inconsistent with the letter of June 12, 1942, reproduced in count six (R. 30–35), wherein petitioners' purchase of the accrued interest obligations is disclosed to their investors. But there is nothing inconsistent between (1) an allegation that petitioners, in obtaining control of the interest obligations at compromise figures, pretended that the City was liquidating the coupons and concealed the fact that they were acquiring them with their

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"representative of holders owning approximately $500,000.00 par value of such [Panama City] bonds."

own funds, and (2) subsequent statements in the aforementioned letters which, in referring to a *fait accompli,* note that these interest obligations had theretofore been "purchased" by petitioners. The proof may show that these letters were intended as a "foil to parry the charge of fraud in case of prosecution,"[7] or to facilitate the final step of fraudulently converting to petitioners' own use the refunding bonds which the investors were entitled to receive from the City.

It is manifest, we believe, that the scheme to defraud is set forth with sufficient particularity to inform petitioners of the nature of the offense charged and to enable them to prepare their defense; and no more is required under the principles established by *United States* v. *Hess,* 124 U. S. 483, upon which petitioners rely. As this Court has said, "While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible

[7] See *Freeman* v. *United States,* 244 Fed. 1, 13 (C. C. A. 7). Similarly, the offer by petitioners in the same letter (R. 34) to resell the coupons to the bondholders at the price previously paid by petitioners, provided that the bondholders would pay "an expense charge" of $120 for each $1,000 bond, may be proved to have been made to cover up the fraud.

to prove." *Evans* v. *United States,* 153 U. S. 584, 590. "The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice." *United States* v. *Simmons,* 96 U. S. 360, 364. The deficiencies claimed to exist here in charging the scheme constitute matters of time, place, and circumstances which are not essential to an indictment, but fall rather within the scope of a bill of particulars which the trial judge, in his discretion, might require the Government to supply. *Glasser* v. *United States,* 315 U. S. 60, 66.

2. Petitioners contend that the indictment is duplicitous because "the scheme alleged here could not have been, as this indictment undertakes to charge, a unitary scheme conceived on January 1, 1931" (Pet. 15, 35–36). However, petitioners confuse the scheme to defraud with the means by which it was to be carried out.[8] The alleged ulti-

[8] It was not essential that when the artifice was devised the schemers should have worked out all of the details of its execution; nor does the recital in the indictment of some of the subsequent developments render the pleading duplicitous. In considering the sufficiency of the indictment the scheme to defraud and the means by which it was to be carried out must be distinguished." *Muench* v. *United States,* 96 F. 2d 332, 335 (C. C. A. 8). See also *Weiss* v. *United States,* 122 F. 2d 675, 680–681, certiorari denied, 314 U. S. 687; *Leche* v. *United States,* 118 F. 2d 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Van Riper et al.* v. *United States,* 13 F. 2d 961, 964 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States,* 273 U. S. 702.

mate purpose in gaining possession and control of the defaulted bonds and interest coupons was wrongfully to convert proceeds therefrom to petitioners' own use. The claims were reduced to judgments, and when, after ten years of negotiations, as summarized in petitioners' circular letter of June 12, 1942, to investors (R. 30–35), a refunding agreement was finally entered into with the City, petitioners were in a position to collect on the judgments and attain their original object to the extent of wrongfully converting, as charged in the indictment (R. 5), a substantial portion of the proceeds to their own use.

3. Petitioners also claim (Pet. 13–15) that the letters alleged to have been mailed for the purpose of executing or attempting to execute the scheme to defraud "show on their face that they could not have been in execution of any scheme" (Pet. 13). But the fact that the letters in counts 2, 3, 4, 7, and 8 proposed to pay defaulted 1941 interest coupons at the original 6% rate, or that the letter in count 1 related only to the principal of the investor's bond, in no way contradicts the allegations as to the scheme to defraud investors on their defaulted coupons of 1937 through 1940. "The indictment alleged that the letters were caused to be mailed in furtherance of the scheme, and whether or not this was true was a question of fact for the jury." *Muench* v. *United States,*

96 F. 2d 332, 336 (C. C. A. 8). For instance, it may well appear at the trial that the remittance to the investor mentioned in the letters covered by counts 2, 10, and 11 did not represent the full value of the investor's claim against the City, since it did not include interest on the judgment obtained. As to others, it may appear that they were for a "lulling" purpose, sent so "that further frauds which are part of the scheme may be perpetrated." *Kann* v. *United States,* 323 U. S. 88, 94–95.[9]

4. The court below held only counts 8 and 9 good as against the petitioner The Crummer Company, since, as to all other counts, the letters alleged therein to have been mailed in furtherance of the scheme were mailed prior to the date the Company is alleged to have been organized (R. 171). Petitioner claims that this constitutes error as to count 8, inasmuch as the United States, as appellant in the circuit court of appeals, expressly did "not challenge" (R. 192) the district court's finding that only count 9 was valid on this score

[9] Paragraph 11 of count 1 recites that the letters were sent through the mails "in order to induce the persons to be defrauded * * * to part with their Panama City bonds and interest obligations * * *, and in order to lull the said persons to be defrauded into a false sense of security, and in order to enable the defendants to convert to their own use and benefit the monies and other valuable property of the persons to be defrauded * * * " (R. 7).

as against the Company. Nevertheless, the Government's appeal embraced The Crummer Company insofar at least as the indictment was held to be indefinite, etc. (R. 65–68; particularly the citation, R. 67–68). The authorities cited by petitioner do not show any lack of power in the circuit court of appeals to correct what it considered to be error, and since the letter in count 8 was allegedly mailed on or about December 17, 1942 (R. 42), and The Crummer Company was allegedly organized on or about November 10, 1942 (R. 4), the district court's conclusion as to count 8 was at least questionable.[10]

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions or important question of law is involved. It is respectfully

[10] That a federal appellate court may *sua sponte* consider plain error prejudicial to the accused, and resulting in a miscarriage of justice, although neither raised in the trial court nor assigned as error, is well established. *Wiborg* v. *United States*, 163 U. S. 632, 658; *Gros* v. *United States*, 136 F. 2d 878, 880–881 (C. C. A. 9); *Banning* v. *United States*, 130 F. 2d 330, 339 (C. C. A. 6), certiorari denied, 317 U. S. 695. And since "the object of criminal proceedings is to convict the guilty, as well as to shield the innocent" (*Evans* v. *United States*, 153 U. S. 584, 590), no reason appears, and none is suggested by petitioner, why the court below should not have exercised this prerogative for the benefit of the Government by correcting what it apparently considered plain error in the trial court's invalidation of count 8.

submitted, therefore, that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 762

ROY E. CRUMMER, HEWEN A. LASSETER, COURTNEY S. TURNER, WILLIAM J. MEREDITH, JAMES G. MARTIN, VERNON T. McCOMBS, MARJORIE SCHOCKLEY, HERBERT MOON, ROY F. PRESTON, CARL A. MORAWITZ, R. E. CRUMMER & COMPANY, A CORPORATION, AND THE CRUMMER COMPANY, A CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY FOR PETITIONERS.

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Petitioners,

vs.

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Respondent.

REPLY FOR PETITIONERS.

The importance of this case to petitioners makes it desirable that a short reply be filed to respondent's brief in opposition.

Apropos of respondent's footnote (Resp. Br. p. 2), conceding as applicable the three-month period for certiorari allowed by Sec. 8(a) of the Act of February 13, 1925 as amended (28 U. S. C. 350), the case of *Nye* v. *United States,* 313 U. S. 33, 44, so decides.

Respondent's argument in opposition is inadvertently incomplete and misleading with respect to the point separately raised and argued on behalf of The Crummer Company. To justify the action of the Circuit Court of Ap-

peals in reversing the District Court in respect of Count 8, the brief in opposition refers to the fact that the indictment alleged the Company's incorporation on November 10, 1942, and that the letter involved in Count 8 was mailed on December 17, 1942. (Resp. Br. p. 23.) The allegation, standing *alone,* as to the date of The Crummer Company's incorporation, was not sufficient to bring that Company into the case. To do that, the indictment alleged (Ind. par. 4; R. 4) that it was part of the alleged scheme "that said defendants *in the name of The Crummer Company,* would and did, on or about *January 1, 1943,* and thereafter, continue to consummate all of the pending and incompleted negotiations, dealings, business, affairs and activities theretofore carried on by said defendants in the name of R. E. Crummer & Company." (Italics supplied.) The Crummer Company, therefore, is *not* alleged to have entered the picture, even in name, until "on or about January 1, 1943, and thereafter." The letter involved in Count 8 is alleged to have been mailed previously on December 17, 1942. The *only* count in the indictment where a mailing occurred *after* The Crummer Company entered the transaction is Count 9. Respondent suggests (Resp. Br. fn. p. 23) that since a reviewing court may consider a plain error prejudicial to an accused individual, even though it shall not have been assigned as error, "no reason appears" to respondent why the Court should not exercise the same prerogative for the benefit of the Government. The answer is obvious. The situations are *not* the same. In the case at bar, *after* errors assigned, by *express admission* of the Government contained in its brief filed in the Circuit Court of Appeals, the ruling of the District Court in respect of Count 8 of the indictment was "not challenged" by the Government. This constituted a waiver. The disposition of the case as to The Crummer Company by the Circuit Court of Appeals, therefore, was and is not

consistent with the issue as presented to it in respect of said petitioner.

Respondent has endeavored to clarify and justify the ambiguities of the indictment. In some instances this is at the expense of its text.[1, 2, 3] In others it is by advancing arguments in justification which are inappropriate to the support of an indictment in a criminal case.[4] Not stopping to recount them here, illustrations of some are

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1. Respondent says (Resp. Br., p. 8) that petitioners falsely represented "that Panama City could not pay the original coupon rate of 6% without impairing its refunding program," thus making it appear that respondents made unqualified and categorical statements in that respect. Actually the text of the indictment is that "*if all holders* of Panama City original bonds *had demanded the original coupon rate of 6%*, that the program would never have been able to operate, as the said City could not have possibly produced sufficient funds to meet this obligation." (Italics ours.) (R. 7-8.) It is to be observed that the final refunding rate agreed upon was 4%.

2. Respondent's statement (Resp. Br., p. 8) that petitioners were able to secure control "over a large number of Panama City bonds" by requesting that they be sent in for an interest endorsement is wholly unjustified. The indictment does not claim that *any* bonds were ever sent in to defendants. (R. 10.) Furthermore, in the Circuit Court of Appeals the Government conceded that this case is not concerned with the principal of the bonds. (R. 217.)

3. Respondent's statement (Resp. Br., p. 9) that defendants collected large amounts of refunding bonds in Cause No. 26, citing pars. 6, 9, 11-B, 11-C, 11-D and 11-E (R. 5, 6, 7, 8-9), is not supported by the record references. It is impossible for defendants to tell from this indictment whether one or two cases are involved.

4. To our point that no facts are stated in the indictment to support the conclusion that temporary representation agreements and powers of attorney were "fraudulently obtained" it is answered that such is *implied* in the allegations of the indictment (Resp. Br., p. 17); to the point that it is not claimed that petitioners did not have any interest in the coupons merged in the judgment, it is said that this is *negatively* alleged. (Resp. Br., p. 16.) The proposition that matters can be either *implied* or *negatively* alleged in criminal indictments is wholly foreign to the law.

set out in the margin. Our point is—that by thus restating and regrouping its constituent averments, the indictment is here given a specificity which it does not in fact possess. In resolving the opposing points of view, petitioners invite examination of the indictment.

Respondent's statement of the basic theory on which this indictment is drawn shows, that when it is required to be clearly stated, it is one which is completely refuted by the indictment itself. (Resp. Br. p. 12.)[5]

Respondent complains of the purchase, during 1937-1940 from Panama City bondholders, at prices which were the equivalent of 33% and 50% of par respectively, of Panama City defaulted interest coupons, some of which had been involved in judgment and *all* of whose bonds had been in default from seven to ten years at the times of purchase. The theory is that even though the original purchase of the coupons was at a price, which is not claimed to be inadequate or improvident at the time, respondent claims the circumstances surrounding the purchase made it rescindable in equity at the option of the bondholder; therefore the bondholders were deprived of the opportunity to collect the full amount of the coupons and the defendants in fact converted the same to their use. Various general allegations, contained in the indictment, with reference to the so-called domination of corporations, employment of a sales force, distribution of circulars, conversion of funds (the

5. "A careful consideration of the instant indictment as a whole discloses that the scheme charged was for petitioners to obtain control, as purported beneficiaries, of Panama City past due bonds and interest claims from the public holders thereof, thereafter to acquire ownership of the bondholders' interest claims for substantially less than their face amount by means of false representations and nondisclosures of facts, and, finally, after merging the bonds and interest claims into judgment and collecting them in full from the city, to convert fraudulently to petitioner's own use and benefit a substantial portion of the ultimate recovery."

latter arrived at by treating the purchase as ineffective) are subordinate, if not indeed irrelevant, to this basic theory of culpability. They are diversionary allegations designed to distract attention from a fundamental weakness in the indictment's theory of liability.

The *record* shows that on June 12, 1942, R. E. Crummer & Co., one of the corporate defendants, sent a letter "To the Holders of the City of Panama City, Florida, Bonds." (R. 30-35.) This letter reviewed the circumstances leading up to the refunding arrangements which were then submitted to the bondholders and which were outlined in the letter. The Court's attention is called to the fact that this letter *specifically* directed the attention of the bondholders to four salient facts: *first*, that the Company had theretofore purchased defaulted interest coupons and interest claims at prices which were fair and proper under the circumstances prevailing at the moment of purchase; *second*, that commercial conditions had since improved, and that the refunding of the City's debt was about to be then concluded under unexpectedly favorable circumstances; *third*, that the Company stood to realize a substantially higher recovery value on the coupons which it had purchased than it originally anticipated; *fourth, that any bondholder who wished could have his coupons back at the price previously paid to the Company.* (R. 34.)

Petitioners submit that the foregoing offer to Panama City bondholders, contained in the letter of June 12, 1942, fully set forth in this indictment, exculpated R. E. Crummer & Co., its officers and employees, of and from *any* form of civil or criminal liability. It negatives respondent's theory that this transaction was a scheme or artifice because it *disclaims* any intent or desire to collect the coupons in full, against the will of the bondholder who had sold them.

In an effort to dissipate the indisputable force of this letter respondent borrows a phrase from another case (wholly unlike the one at bar) and infers—without any specific basis therefor set forth in the indictment (Resp. Br. p. 19)—that the proof *may* show that the letter was intended to "parry a charge of fraud." Such a letter did not merely "parry" a charge—it completely *extinguished* any charge of fraud, civil or criminal. Is it not true that under this letter the final choice was left to the bondholder? If, as respondent argues in its hypothesis (Resp. Br. p. 12), the Company collected the coupon in full from the City, it was only with the acquiescence of the bondholder and after an opportunity to reacquire his coupons. What more could or should have been done? Nor can the indictment be stretched to infer that this was a "lulling" letter, as is sometimes argued in mail fraud cases. Quite to the contrary, this was an *arousing* offer. It was *arousing* because it put the bondholder on notice that his coupons were again worth par. It *specifically* advised the bondholder that the defendant Company expected to collect the coupons with profit to the Company. Since it offered the bondholder that if he wished he might have his coupons back at the price previously paid, there can be no fraud, civil or criminal.

The letter of June 12, 1942, obviously was before the Grand Jury when this indictment was drawn. It may be taken for granted that if this letter had not in fact been circulated to the bondholders, or if this offer had not in fact been made, this indictment would carry allegations to that effect. There would be no need for the *innuendo* contained in the brief in opposition that the proof *might* show something in derogation of this letter.

Respondent has not undertaken to defend here the philosophy urged so successfully in the Circuit Court of

Appeals, to the effect that in indictments under the Mail Fraud Statute an accused need not be informed in respect of the scheme or artifice to defraud with the same particularity as with respect to the use of the mails.

Petitioners suggest that this false philosophy is being employed to aid or support an indictment drawn in vague and general terms in order to mask a fundamental weakness in its conception of liability.

Respectfully submitted,

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